166-718

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 346.

FAIRFAX H. WHEELAN, ADMINISTRATOR, &c.,
PLAINTIFF IN ERROR,

vs.

JOHN BRICKELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 28, 1895.

(16,039.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from superior court	1	1
Complaint	1	1
Demurrer of defendant John Brickell to complaint	30	14
Answer of defendant Ferries and Cliff House Railway Co	32	15
Order sustaining demurrer	33	15
Judgment	33	16
Clerk's certificate to judgment-roll	35	16
Notice of appeal	35	17
Stipulation as to transcript, &c	36	17
Clerk's certificate to transcript	37	17
Acceptance of service of copy of transcript	38	18
Opinion	39	18
Judgment	42	19
Writ of error	44	19
Citation (copy)	47	20
Affidavit of service of citation	48	21
Bond	52	22
Assignment of errors	56	24
Clerk's certificate	61	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1896.

a

No. 15557.

In the Supreme Court of the State of California.

FAIRFAX H. WHEELAN, as Administrator, etc., Plaintiff and Appellant,
vs.
JOHN BRICKELL *et als.*, Defendants and Respondents.

Transcript on appeal from the superior court of the city and county of San Francisco, State of California; J. C. B. Hebbard, judge.

King & Shaw, attorneys for appellant.
A. N. Drown, attorney for respondent John Brickell.

Filed this 23rd day of November, 1893.
LEWIS H. BROWN, *Clerk*,
By G. E. MADISON,
Deputy Clerk.

1 In the Supreme Court of the State of California.

TRANSCRIPT ON APPEAL.

Complaint.

In the Superior Court in and for the City and County of San Francisco, State of California.

FAIRFAX H. WHEELAN, as the Administrator of the Estate of John H. Baker, Deceased, Plaintiff,
vs.
JOHN BRICKELL, MARIA BAKER, G. LARGOMARSINO, Antonio Lagamo, Francisco Oliva, The Ferries and Cliff House Railway Company (a Corporation), John Doe, and Richard Roe, Defendants. } Complaint.

2 Action to quiet the title of the estate of John H. Baker, deceased, and to restore the said estate and the administrator thereof to the possession of the land and the premises hereinafter mentioned and described.

Now comes the plaintiff, Fairfax H. Wheelan, administrator, and as the administrator of the estate of John H. Baker, deceased, and for cause of action alleges as such administrator—

I.

That by an order of the superior court in and for the city and county of San Francisco, State of California, department nine thereof, sitting in probate in the matter of the said estate of said John H. Baker, deceased, duly given made and entered on the 6th

day of June, 1890, upon petition and due and regular proceedings had for that purpose, this plaintiff was duly and regularly appointed administrator of the estate of said John H. Baker, deceased, and that thereafter, and on the 20th day of August, 1890, letters of administration upon said estate were duly and regularly issued to this plaintiff, and that thereupon this plaintiff duly qualified as such administrator and entered upon and still continues in the discharge of the duties of his said office, and that said letters of administration have never been revoked, and are still in full force and effect.

3 II.

That on the 30th day of March, A. D. 1863, John H. Baker died intestate in the city and county of San Francisco, State of California.

III.

That for a long time prior thereto, and until the time of his death, the said Baker was the owner and possessor and in full possession of the lands and premises hereinafter fully described and set forth in this complaint and known as the Golden Gate rancho and Baker rancho.

IV.

That on the 13th day of April, A. D. 1863, Maria Baker, the widow of said John H. Baker, duly filed her petition in the probate court, in and for the city and county of San Francisco, State of California, wherein she prayed for letters of administration upon the estate of her said husband.

That said John H. Baker was a resident of the said city and county of San Francisco, at the time of his death, and such proceedings were duly had upon said petition, that the said probate court, by its order, duly given and made, on the 27th day of April, 1863, duly appointed said Maria Baker, administratrix of the said estate of said John H. Baker, deceased, and that thereafter, and to wit:

4 on the 2nd day of May, 1863, she the said Maria Baker, received letters of administration upon said estate, and duly qualified and entered upon, and until the time of her marriage hereinafter set forth, continued in the discharge of the duties of her office as such administratrix.

V.

That the said probate court, by an order duly given, made, and entered on the 26th day of October, A. D. 1863, ordered the said administratrix to pay to the said Maria Baker the sum of one hundred ($100) dollars per month from the 2nd day of May, 1863, as an allowance for the support of the said Maria Baker as the widow of the said Baker, deceased, and her family, and the said order has never been vacated, set aside, nor modified in any way whatever; that no part of the said family allowance, as aforesaid, has ever been paid, and the whole thereof accruing and accrued, together with the expense of administration, is now due, owing and unpaid, and the

said family allowance and the said expenses of administration are now a charge and a debt against the said estate; that there is no property in said estate with which said family allowance and said expenses of administration can be paid, other than the real property hereinafter fully described and set forth in this complaint.

VI.

That no distribution of said estate has ever been made,
5 had or given by said administratrix or otherwise, nor by the plaintiff herein or at all.

VII.

That while the said Maria Baker was so in and exercising her said office, as the said administratrix of the said John H. Baker, deceased, to wit, on the 14th day of September, 1872, she filed her petition with the clerk of the board of supervisors, of the city and county of San Francisco, praying therein to obtain a grant and deed from said city, under the act of Congress, approved March 8th, 1866, entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," and order eight hundred (800) of said board, duly approved January 14th, 1868, entitled "Order 800. An order for the settlement and quieting titles to lands in the city and county of San Francisco, situated above high-water mark of the bay of San Francisco and the Pacific ocean, and without the former corporate limits of the city of San Francisco," and the act of the legislature of the State of California, approved March 14th, 1870, entitled "An act to expedite the settlement of land titles in the city and county of San Francisco;" and that there were then living several, to wit: six children of the said
6 John H. Baker, deceased, and they with the said Maria Baker constituted his heirs-at-law, and the said children or some of them are now living.

That the said petition alleged that Maria Baker, the petitioner, was a widow, and was with her said family of children in *bona fide* actual possession of the land described in said petition since the 11th day of July, 1860, continuously up to the date of the filing of said petition with said board, and continued to occupy said lands, and that her possession of said property through herself was complete, full, undisputed, and notorious, from the 11th day of July, 1860, up to the date of said petition and the filing thereof, and that the said petitioner's claim to said land was delineated upon the official map of the outside lands in proper manner and form; that the outside lands assessments had been paid in full under said order eight hundred (800), and also the city and county and State taxes for the five years previous to 1866, and such taxes for all the succeeding years.

That, in pursuance of said petition, such proceedings were had that a grant of all the right, title and interest which said city then had or held in or to said lands was made in pursuance of said petition and evidence to Maria Baker by said board, and that there-

after, and on the 9th day of January, A. D. 1873, pursuant to said grant and petition, a deed was made and executed by the
7 said city and county of San Francisco, by William Alvord, mayor, to said Maria Baker, of said land, purporting to convey to said Maria Baker all of whatever claim, right, title and interest the said city and county then had therein and thereto.

VIII.

And plaintiff alleges that as matter of fact said Maria Baker took the said steps, filed said petition and obtained said grant and deed in her official capacity as the administratrix of the estate of John H. Baker, deceased, and for the use, benefit, and behoof of said estate, and not in her individual capacity, nor for her own private uses or purposes, and that Maria Baker obtained said grant and deed in trust and as trustee for the use and benefit of said estate of said John H. Baker, deceased, but unintentionally, and by mistake and inadvertence, said grant and deed was made to her as grantee in her own name instead of in her official capacity, viz: to "Maria Baker," instead of to "Maria Baker, as administratrix of the estate of John H. Baker, deceased," she then being, and at all times since the 2nd day of May, 1863, had been the duly appointed administratrix of said estate.

IX.

And plaintiff further alleges that at the time said Maria Baker was so appointed said administratrix of said estate, on the 2d day of May, 1863, as aforesaid, she was an unmarried woman, and
8 that afterwards, and on to wit: on the 21st day of May, A. D. 1873, the said Maria Baker, while such administratrix, intermarried with David F. Batchelder, and lived thereafter continuously and cohabited with him as his wife until the eleventh day of January, 1888; that by reason of said marriage of said administratrix with said Batchelder, on the 21st day of May, 1873, as aforesaid, her authority as such administratrix then and on that day ceased.

X.

That after the said marriage of said Maria Baker with said David F. Batchelder, as aforesaid, and to wit: on the first day of June, A. D. 1874, and being one year and ten days after the said Maria Baker's authority had ceased as the administratrix of said estate of John H. Baker, deceased, she joined with her said husband, David F. Batchelder, as Maria Baker-Batchelder, his wife, in the execution of a joint and several promissory note made payable to John Brickell, five years from the first day of June, 1874, for the sum of $36,000, with interest at ten per cent. per annum, said interest to be added to the principal monthly and bear like interest if not monthly paid; and afterwards they in like manner, on the 14th day of December, 1874, delivered to the said Brickell their second joint and several promissory note for one thousand ($1,000) dollars, payable

on the 1st day of June, 1879, with interest thereon at one per
9 cent. per month until paid, which interest if not paid monthly to be added to the principal and bear like interest; and afterwards, and on the 1st day of June, 1875, the said Maria Baker-Batchelder and David F. Batchelder made and delivered their other and third joint and several promissory note to the said John Brickell for the sum of thirty-five hundred ($3,500) dollars, payable on the 1st day of June, 1879, with interest thereon, payable monthly, at the rate of one per cent. per month until paid, and any interest remaining due and unpaid to be added monthly to the principal and form a part thereof and bear interest at the same rate.

That afterward, and on the 20th day of February, 1877, the said Maria Baker-Batchelder and her husband, the said David F. Batchelder, made, executed and delivered their fourth joint and several promissory note, in the sum of two thousand ($2,000) dollars, payable on the 1st day of June, 1879, to said John Brickell, with interest thereon until paid at the rate of one and one-quarter per cent. per month, payable monthly, and any interest which remained due and unpaid to be added monthly to the principal, form a part thereof, and bear interest at the same rate.

XI.

That on the said 1st day of June, 1874, the said David F. Batchelder and said Maria Baker Batchelder, his wife, as parties of
10 the first part, and said John Brickell as party of the second part, wrongfully, unlawfully and fraudulently, entered into an indenture, in writing, of mortgage in and by which the said parties of the first part for, and in consideration of the said sum of $36,000, and said promissory note of that date, and the promissory note of $1,000, dated December 14th, 1874, hereinbefore referred to, wrongfully and fraudulently assumed, undertook, and pretended to grant, bargain, sell, convey and confirm to said John Brickell, party of the second part, by way of mortgage to secure said two promissory notes, all and singular the lands and premises of said estate of John H. Baker, deceased, hereinbefore referred to, and hereinafter specifically described, designated and mentioned.

That afterward, and on the 1st day of June, 1875, the said David F. Batchelder and Maria Baker Batchelder, his wife, as parties of the first part, and said John Brickell, as party of the second part, wrongfully and fraudulently entered into a second indenture of mortgage in and by which the said parties of the first part, with the wrongful knowledge and consent of the said party of the second part, wrongfully and fraudulently undertook to grant, bargain, sell, alien, release, convey and confirm to said John Brickell by way of mortgage to secure the said promissory note of that date hereinbefore mentioned to said party of the second part, all and sin-
11 gular the lands of the said estate of John H. Baker, deceased, hereinbefore mentioned and more particularly hereinafter described and mentioned with other lands not belonging to said estate.

That afterward, and on the 20th day of February, A. D. 1877, the said David F. Batchelder and said Maria Baker-Batchelder, his wife, as parties of the first part, and said John Brickell, as party of the second part, wrongfully and unlawfully and fraudulently entered into a third indenture of mortgage in and by which the said parties of the first part, with the wrongful knowledge and consent of the said party of the second part, said John Brickell, and in wrongful and fraudulent collusion with him, wrongfully and illegally and fraudulently undertook to grant, bargain, sell, alien, release, convey, and confirm to said John Brickell, by way of mortgage to secure the payment of the said promissory note of that date for two thousand (2,000) dollars, hereinbefore referred to, and mentioned, all the real property of the said estate of John H. Baker, deceased, hereinbefore referred to and mentioned, and hereinafter more particularly designated, described, and mentioned; that all of said mortgages were so acknowledged as to entitle them to be recorded, and each thereof was recorded in the recorder's office of the
12 city and county of San Francisco, in the proper books of record, on or about the respective dates of their execution and delivery to said defendant, John Brickell.

XII.

That afterward, and on the 25th day of June, A. D. 1878, said defendant, John Brickell, commenced an action in the district court of the 23rd judicial district of the State of California, in and for the city and county of San Francisco, against the said David F. Batchelder and Maria Baker Batch-der, his wife, to recover judgment against them upon said four promissory notes hereinabove mentioned, with interest thereon, and for taxes paid upon the land described in the said three mortgages hereinbefore referred to, and for costs of suit, amounting to the sum of fifty-two thousand nine hundred and fifty-one and fifty-hundredths ($52,951.50) dollars, in gold coin of the United States, and in said action prayed that said three mortgages be foreclosed, and the proceeds of the sale of the land herein mentioned be applied to the satisfaction of the said promissory notes as carried into the judgment therein prayed for, and that, if the said land was not sold for a sufficient sum to pay such judgment, then that said John Brickell have judgment for the deficiency against said defendants, jointly and severally.

And the said John Brickell, in the prayer of his said complaint, prayed for an order of sale of said lands in said mortgages
13 mentioned; that the sheriff execute a deed to the purchaser of said lands at such sale, and that such purchaser be let into the possession of said premises on the production of the sheriff's deed therefor, and other relief.

XIII.

That such proceedings were had in said action in said district court that the said court, on the said 13th day of November, A. D. 1878, ordered that the plaintiff therein have judgment in the sum

of sixty-one thousand eight hundred and twenty-seven hundredths ($61,800.27) dollars, together with fifteen hundred ($1,500) dollars counsel fees, making a total of $62,300.27; and that afterward, and on the 25th day of November, A. D. 1878, the said 23rd district court, by Honorable J. D. Thornton, the judge thereof, rendered its decree in said action, foreclosing said mortgages to pay said judgment, and ordering the lands in said mortgages mentioned to be sold, and the proceeds thereof to be applied to the satisfaction of said judgment; that said action is numbered 7236 in the register of actions in said court; that said decree of foreclosure was signed by said judge on the said 25th day of November, 1878, and was recorded in Book "B" of Judgments of said court, at page 597, on the 27th day of November, 1878.

XIV.

That, in pursuance of said judgment and decree of fore-
14 closure, the sheriff of the city and county of San Francisco sold all the right, title and interest of said David F. Batchelder and Maria Baker-Batchelder, his wife, in and to all the real property in said mortgages mentioned on the 14th day of January, 1879, to the said plaintiff in said action, the said John Brickell, for the sum of fifty-nine thousand seven hundred and seventy-seven ($59,777) dollars, which sum was paid by crediting the same upon said judgment decree and order of sale aforesaid, and on the 15th day of July, 1879, the said sheriff executed and delivered to the said plaintiff in said action, John Brickell, one of the defendants in this action, the sheriff's deed for all the said lands in said mortgages mentioned so belonging to the estate of John H. Baker, deceased, and hereinafter more particularly described and mentioned, and thereupon the said John Brickell entered into the actual possession of all of said lands, and he has by himself and his tenants ever since continued to use and occupy the same, but such possession, use and occupancy was and is in subordination to the title of the said John H. Baker, deceased, and of his estate, and in subordination to the right and duty of the said Maria Baker as such administratrix and otherwise, and the right and duty of any and all legal or other representatives of the said John H. Baker, to maintain and protect the possession of all of said lands in and for the benefit of said estate and the said heirs of said John H. Baker, deceased, who had
15 not parted with their rights as such heirs; and the said possession, use and occupancy by and under said John Brickell was in subordination to the rights of the said children of the said John H. Baker and his creditors and the creditors of the said estate.

XV.

That said John Brickell claims an estate or interest in said real estate, hereinabove referred to and hereinafter described, adversely to the said estate of John H. Baker, deceased, and the said John Brickell by himself and his tenants, holds the possession thereof adversely against the said estate of John H. Baker, deceased, and against the administrator of said estate, Fairfax H. Wheelan, the

plaintiff herein. That said John Brickell asserts and pretends to hold the legal title to all of said lands under said mortgages, foreclosures, sale, sheriff's deed and possession.

XVI.

That the said property of said estate hereinafter described has not been sold or disposed of in any way or manner whatever, by any order made in the said administration of said estate by the said late probate court, nor by the said superior court, nor by the said administratrix or administrator as such.

That the said lands so owned and possessed as aforesaid by
16 the said John H. Baker, deceased, in his lifetime, and which came into the hands of said administratrix of his estate as such, and have not been sold or disposed of by any order in said probate proceedings in said estate and of which the said John Brickell is in possession, and to which the plaintiff as such administrator, as aforesaid, is entitled to the possession for all the purposes of such administration, *is* bounded, designated, and described as follows, to wit:

(*a.*) Commencing on the westerly line of Twenty-sixth (26th) avenue, distant three hundred and ninety-nine feet and ten inches ($399\frac{10}{12}$) northerly from the northern line of California street; thence northerly along the westerly line of Twenty-sixth (26th) avenue, two hundred feet and two inches ($200\frac{2}{12}$); thence westerly parallel with California street, two hundred and forty (240) feet, to the easterly line of Twenty-seventh (27th) avenue; thence southerly along the easterly line of 27th avenue, two hundred and twenty-four (224) feet and five (5) inches; thence northeasterly two hundred and forty-one feet and three inches ($241\frac{3}{12}$) to the point of commencement; being a portion of block number 97 of said outside lands, so located on said official map as aforesaid.

(*b.*) Commencing at the northwest corner of California street and 27th avenue; thence northerly along the westerly line of said
17 27th avenue, six hundred (600) feet; thence westerly parallel with California street, two hundred and forty (240) feet, to the easterly line of Twenty-eighth avenue; thence southerly along the easterly line of 28th avenue, six hundred (600) feet, to the northerly line of California street; thence easterly along the northerly line of California street, two hundred and forty (240) feet, to the point of commencement; being all of block number 98 of said outside lands, as located upon the said official map.

(*c.*) Commencing at the northwest corner of California street and 28th avenue; thence running along the westerly line of 28th avenue, six hundred (600) feet; thence westerly parallel with California street, two hundred and forty (240) feet, to the easterly line of 29th avenue; thence southerly along the easterly line of 29th avenue, six hundred (600) feet, to the northerly line of California street; thence easterly along the northerly line of California street, two hundred and forty (240) feet, to the point of beginning; being the entire block number 99, as located upon said outside land map aforesaid.

(*d.*) Commencing at the northwest corner of Twenty-ninth avenue and California street; thence northerly along the westerly line of 29th avenue, six hundred (600) feet; thence westerly parallel with California street two hundred and forty (240) feet, to the easterly
18 line of 30th avenue; thence southerly along the easterly line of Thirtieth avenue, six hundred (600) feet, to the northerly line of California street; thence easterly along the northerly line of California street, two hundred and forty (240) feet, to the point of beginning; being the entire block number 100 of the outside lands, as located on the map aforesaid.

(*e.*) Commencing at the northwest corner of California street and Thirtieth avenue; thence northerly along the westerly line of Thirtieth avenue six hundred (600) feet; thence westerly parallel with California street two hundred and forty (240) feet to the easterly line of Thirty-first avenue; thence southerly along the easterly line of Thirty-first avenue six hundred (600) feet to the northerly line of California street; thence easterly along the northerly line of California street two hundred and forty (240) feet to the point and place of beginning, being the entire block number 101 of the said outside lands, as located upon the map aforesaid.

(*f.*) Commencing at the northwest corner of California street and Thirty-first avenue; thence northerly along the westerly line of Thirty-first avenue six hundred (600) feet; thence westerly, parallel with California street, two hundred and forty (240) feet to the easterly line of Thirty-second avenue; thence southerly along the eastlerly line of Thirty-second avenue, six hundred (600) feet
19 to the northerly line of California street; thence easterly along the northerly line of California street two hundred and forty (240) feet to the point and place of beginning, being the entire block number 102 of said outside lands, as located upon said map.

(*g.*) Commencing at the northwest corner of California street and Thirty-second avenue; thence northerly along the westerly line of Thirty-second avenue, six hundred (600) feet; thence westerly one hundred and forty (140) feet six (6) inches; thence southeasterly six hundred and three (603) feet and five (5) inches, more or less to a point on the northerly line of California street, one hundred and sixty feet and four inches ($160\frac{4}{12}$) easterly from Thirty-third avenue; thence easterly along the northerly line of California street, seventy-nine feet and 8 inches ($79\frac{8}{12}$) to the point of commencement, being a portion of outside land, block number 103, as located on said map.

(*h.*) Commencing on the westerly line of Thirty-second avenue, distant two hundred and twenty-four feet and six inches ($224\frac{6}{12}$) northerly from the northerly line of Clement street; thence northerly along the westerly line of Thirty-second avenue, three hundred and seventy-five feet and six inches ($375\frac{6}{12}$) to the southerly line of California street; thence westerly along the southerly line of
20 California street seventy-one feet and seven inches ($71\frac{7}{12}$); thence southeasterly, parallel with Thirty-second avenue, three hundred and eighty-one feet and two inches ($381\frac{2}{12}$) to a point two hundred and eleven feet and four inches ($211\frac{4}{12}$) easterly

from Thirty third avenue; thence northeasterly twenty-nine feet and eight inches ($29\frac{8}{12}$) to the point of commencement, being a portion of outside land, block number 150, as laid down upon the said map of outside lands.

(*i.*) Commencing on the westerly line of Thirty-first avenue, distant two hundred and fifty-six feet and eight inches ($256\frac{8}{12}$) northerly from the northerly line of Clement street; thence northerly along the westerly line of Thirty-first avenue, three hundred and forty-three feet and four inches ($343\frac{4}{12}$), to the southerly line of California street; thence westerly along the southerly line of California street, two hundred and forty (240) feet, to the easterly line of Thirty-second avenue; thence southerly along the easterly line of Thirty-second avenue, three hundred and sixty-eight feet and two inches ($368\frac{2}{12}$); thence northeasterly two hundred and forty-one feet and three inches ($241\frac{3}{12}$), to the point of commencement; being a portion of outside land block number 151, as located upon said outside land map as aforesaid.

(*j.*) Commencing on the westerly line of Thirtieth avenue,
21 distant three hundred and seventy-five (375) feet northerly from the northerly line of Clement street; thence northerly two hundred and twenty-five (225) feet along the westerly line of Thirtieth avenue, to the southerly line of California street; thence westerly along the southerly line of California street two hundred and forty (240) feet, to the easterly line of Thirty-first avenue; thence southerly along the easterly line of Thirty-first avenue, two hundred and twenty-five (225) feet; thence easterly parallel with California street, two hundred and forty (240) feet, to the point of commencement; being a portion of block number 152 of outside lands, as located on said outside land map as aforesaid.

(*k.*) Commencing on the westerly line of Twenty-ninth avenue, distant three hundred and twenty feet and ten inches ($320\frac{10}{12}$) northerly from the northerly line of Clement street; thence northerly along the westerly line of Twenty-ninth avenue, two hundred and seventy-nine feet and two inches ($279\frac{2}{12}$), to the southerly line of California street; thence westerly along the southerly line of California street, two hundred and forty (240) feet, to the easterly line of Thirtieth avenue; thence southerly along the easterly line of
30th avenue; three hundred and three feet and eleven inches ($303\frac{11}{12}$); thence northeasterly two hundred and forty-one feet
22 and three inches ($241\frac{3}{12}$), to the point of beginning; being a portion of the outside land block number 153, as located on the said map of outside lands as aforesaid.

(*l.*) Commencing on the westerly line of Twenty-eighth avenue, distant three hundred and fifty-two feet and eleven inches ($352\frac{11}{12}$) northerly from the northerly line of Clement street; thence northerly, along the westerly line of Twenty-eighth avenue, two hundred and forty-seven feet and one inch ($247\frac{1}{12}$) to the southerly line of California street; thence westerly along the southerly line of California street two hundred and forty (240) feet to the easterly line of Twenty-ninth avenue; thence southerly along the easterly line of Twenty-ninth avenue, two hundred and seventy-one feet and eleven

inches ($271\frac{1}{12}$); thence northeasterly two hundred and forty-one feet and three inches ($241\frac{3}{12}$) to the point of commencement, being a portion of block No. 154 of outside lands, as located upon the official map thereof as aforesaid.

(*m.*) Commencing on the westerly line of Twenty-seventh avenue; distant three hundred and eighty-four feet and three inches ($384\frac{3}{12}$) northerly from the northerly line of Clement street; thence northerly along the westerly line of Twenty-seventh avenue, two hundred and fifteen feet and nine inches ($215\frac{9}{12}$) to the southerly
23 line of California street; thence westerly along the southerly line of California street, two hundred and forty feet (240) to the easterly line of Twenty-eighth avenue; thence southerly, along the easterly line of Twenty-eighth avenue, two hundred and thirty-nine feet and eleven inches ($239\frac{11}{12}$); thence northeasterly two hundred and forty-one feet and three inches ($241\frac{3}{12}$) to the point of commencement, being a portion of block number 155, of outside lands, as located upon the said official map thereof, as aforesaid.

(*n.*) Commencing at a point distant six hundred (600) feet northerly from the northerly line of California street, and ninety-nine feet and six inches ($99\frac{6}{12}$) easterly from the easterly line of Thirty-third avenue; thence north, nine degrees west, six and two-elevenths ($6\frac{2}{11}$) chains; thence north seven degrees west, five and nineteen-hundredths chains (5.19) to the Pacific ocean, thence following along the shore of the Pacific ocean, south, seventy-eight and one-fourth ($78\frac{1}{4}$) degrees east, three chains and ninety-five links (3.95); thence north, fifty and three-fourths degrees ($50\frac{3}{4}$) east, sixteen chains and forty-two links (16.42); thence north, eighty-eight (88) degrees east, five chains and eighty-eight (88) links; thence north, four and one-half ($4\frac{1}{2}$) degrees east, sixty-four links (64); thence north, fifty-nine and one-fourth degrees ($59\frac{1}{4}$) east, seventy-nine (79) links;
24 thence south, fifty-nine and three-fourths ($59\frac{3}{4}$) degrees east, eighty (80) links; thence north, sixty-nine and three-fourths ($59\frac{3}{4}$) degrees east, one chain and eighty links (1.80); thence north, eighty-three and three-fourths ($83\frac{3}{4}$) degrees east, seventy-nine links (79), thence south, seventy-nine and one-fourth ($79\frac{1}{4}$) degrees east, one chain and forty-one links (1.41); thence north, forty-six and three-fourths ($46\frac{3}{4}$) degrees east, five chains and eleven links (5.11); leaving the shore of the sea at that point; thence south, seventeen degrees east, thirteen chains and three links (13.03) to the westerly line of Twenty-fifth avenue; thence southerly, along the westerly line of Twenty-fifth avenue, seven hundred (700) feet, more or less, to the northwest corner of Lake street and Twenty-fifth avenue; thence westerly, along the northerly line of Lake street, two thousand four hundred (2,400) feet, more or less, to a point one hundred and forty feet six inches (140.06) westerly from the northwesterly corner of Thirty-second avenue and Lake street, and to the westerly line of the tract of land herein described, and containing about sixty (60) acres, more or less, and being a part of the said land located upon the said official map of the outside lands as aforesaid.

(*o.*) Also, that certain piece or parcel of land lying upon the east

of the tract of land last above described, and which is bounded and described as follows, to wit:

25 Commencing at the northeasterly corner of the said tract of land last above described and mentioned, on the shore of the Pacific ocean, and running thence north forty-six and three-fourths degree- (46¾) east, three chains and 48 links (3.48); thence south fifty-six and one-half (56½) degrees east, eighty-seven (87) feet; thence south ten (10) degrees east, three chains (3); thence south forty-nine and three-fourths (49¾) degrees east, two chains and eighty-seven links (2.87); thence south seventy-nine (79) degrees east, three chains and thirty-three links (3.33); thence south three (3) degrees east, two chains and ninety-five links (2.95); thence south thirty-four and three-fourths degrees (34¾) west, two chains and forty-five links (2.45); thence south nine (9) degrees west, two (2) chains; thence south forty-three and three-fourths (43¾) degrees west, one chain; thence south six and a half (6½) degrees east, one chain and thirty-eight links (1.38); thence west one (1) chain and eighty-five (85) links, more or less, to the westerly line of Twenty-fifth avenue; thence northwesterly thirteen (13) chains, more or less, to the point of commencement on the shore of the Pacific ocean, and being a part of said Golden Gate rancho and Baker rancho, as aforesaid.

XVII.

26 That the said defendants Maria Baker and John Brickell were well aware of and had full, actual knowledge of the fact at the time of the execution of the four promissory notes and the three mortgages hereinabove mentioned, and at all times since then; that all the land and premises hereinabove described by metes and bounds were parts and parcels of the land and premises owned and possessed by the said John H. Baker in his lifetime, and upon which administration was in progress in the said probate court, and which administration had never been closed, nor distribution nor sale by order of the probate court or superior court had therein.

XVIII.

That the defendants G. Lagomarsino, Antonio Lagamo, Francisco Oliva, The Ferries and Cliff House Railway Co., John Doe and Richard Roe, as plaintiff is informed and believes, and upon his information and belief avers, respectively claim some right, title or interest in the said lands and premises hereinabove described, or some part thereof, adverse to the title of the said John H. Baker, deceased, and the estate thereof, they being tenants in possession and claiming under said John Brickell, but plaintiff alleges that whatever right, title, interest or claim, if any, the said defendants, or either or any of them, may have, is subject and subordinate to the estate, claim, right and title of the estate of John H. Baker, deceased, and of the right to the possession thereof by the

27 administrator thereof, for the purposes of the administration of the estate and distribution thereof and subject and subordinate to the said rights of said children and creditors of said

John H. Baker, deceased, and the said rights of his creditors and the creditors of his estate.

That plaintiff does not know the true names of the defendants designated above by the names of John Doe and Richard Roe, which names are therefore respectively fictitious, and plaintiff prays that when discovered, the true names of said defendants, respectively, may be inserted in the record and in this complaint as though now used herein.

XIX.

That the said defendant, The Ferries and Cliff House Railway Company, is a corporation organized and existing under the laws of the State of California, and having its principal place of business in the city and county of San Francisco, said State.

Wherefore, the said plaintiff prays as the administrator of the estate of said John H. Baker, deceased,

First. For an order, judgment and decree of this honorable court quieting the title of the estate of the said John H. Baker, deceased, in and to all the lots, tracts and parcels of land hereinabove
28 described and mentioned, and that all adverse claims of the said defendants in and to the same be adjudged to be null and void.

Second. To restore the possession of said lands to the estate of said John H. Baker, deceased, and to plaintiff, as such administrator, for the purpose of administration of said estate and to be distributed according to law.

Third. For the sum of thirty thousand ($30,000) dollars damages against said defendant John Brickell, as and for the value of the use and occupation, rents, issues and profits of said lands and premises during the time of his wrongful withholding thereof, to wit: since the 15th day of July, A. D. 1879, up to the date of filing hereof in the said superior court.

Fourth. That the defendants may, and each of them, be declared, ordered, adjudged and decreed to convey by good and sufficient deed of conveyance all of whatever claim, right, title and interest they or either of them have or may have in and to said lots, tracts or parcels of land, or upon their or either of their failure or refusal, upon demand by plaintiff, with the tender of a fair and reasonable sum for costs thereof, to make such conveyance or conveyances, then that this honorable court, by its order, judgment and decree, designate, constitute, appoint, and empower a commissioner to execute such conveyance in the name of said defendants or defend-
29 ant so refusing or neglecting of, in and to all the lands and premises hereinbefore designated, described and mentioned to the estate of said John H. Baker, deceased, and to the plaintiff herein or his successor as the administrator of said estate, and for the use and benefit of said estate; and said plaintiff, for and on behalf of said estate, prays that this honorable court, should it deem it just, meet and equitable in the premises, authorize and permit said plaintiff, as such administrator, to pay out of the proceeds of the sales of said tract, parcels and lots of land, after said conveyance

and within a reasonable time, the several sums of money so borrowed by said Maria Baker Batchelder and David F. Batchelder from said defendant John Brickell, his heirs, executors, administrators or assigns, to the end and with the object, intent and purpose that equity may be done and satisfied, and justice prevail in the premises, providing that such conveyance be made before the trial hereof, but not otherwise.

Fifth. And plaintiff, as such administrator, prays for such other and further order, judgment and decree and relief in the premises for and on behalf of said estate of said John H. Baker, deceased, as to equity appertains and belongs, and as may appear meet, equitable and proper to this honorable court.

And he will, as in duty bound, ever pray.

KING & SHAW,
Attorneys for Plaintiff.

30 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

F. R. King, being first duly sworn, deposes and says: That he is one of the attorneys of the plaintiff in this action, and that Fairfax H. Wheelan, the plaintiff in the above-entitled action, is absent from the city and county of San Francisco, State of California; that the facts in said complaint stated are within the knowledge of affiant, and therefore and for that reason affiant makes this affidavit for and on behalf of plaintiff, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that, as to those matters he believes it to be true.

F. R. KING.

Subscribed and sworn to before me this 13th day of September, 1893.

[SEAL.] THOS. E. HAVEN,
Notary Public.

Endorsed: Filed Sept. 14, 1893. M. C. Haley, clerk, by W. J. Heney, deputy clerk.

Demurrer.

(Title of Court and Cause.)

31 Now comes the defendant, John Brickell, by the undersigned, his attorney, and demurs to the complaint of the plaintiff, in the cause above entitled, upon the following grounds, to wit:

1. That plaintiff has not legal capacity to sue.

2. That plaintiff has not legal capacity to institute or prosecute said action, or to sue upon the cause of action in said complaint alleged.

3. That there is a misjoinder of parties defendant in this:

(*a.*) That this defendant is improperly joined as a defendant with the other defendants therein.

(*b.*) That the defendants, Maria Baker, G. Lagomarsino, Antonio Lagamo, Francisco Oliva, The Ferries and Cliff House Railway Co., John Doe and Richard Roe are, and that each of them is, improperly joined as codefendants in said action with this defendant.

4. That several causes of action have been improperly united therein, to wit:

(*a.*) A cause of action at law with a cause of action in equity.

(*b.*) A cause of action in ejectment, with a cause of action to quiet title.

(*c.*) A cause of action to quiet title, with a cause of action to establish and enforce a trust.

(*d.*) A cause of action arising out of a claim to recover
32 specific real property and damages for the withholding thereof, with a cause of action arising out of a claim against a trustee by operation of law.

5. That the said several causes of action which have been united in said complaint do not affect all of the parties to said action, and are not separately stated.

6. That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Wherefore said defendant prays the plaintiff's complaint be dismissed, and that he have judgment herein for his costs.

A. N. DROWN,
Attorney for Defendant John Brickell.

(Endorsed:) Filed Oct. 5, 1893. M. C. Haley, clerk, by W. C. Hayes, deputy clerk.

Answer of Defendant Ferries and Cliff House Railway Company.

(Title of Court and Cause.)

Now comes The Ferries and Cliff House Railway Company, one of the defendants herein, and for answer to the complaint of plaintiff filed in said action disclaims any right, title or interest of,
33 in or to the premises in said complaint described, or any part or portion thereof.

J. E. FOULDS,
Attorney for Defendant The Ferries and Cliff House Railway Company.

(Endorsed:) Filed Oct. 6, 1893. M. C. Haley, clerk, by W. C. Hayes, deputy clerk.

Order Sustaining Demurrer.

(Title of Court and Cause.)

In this action, the demurrer of defendant, John Brickell, to the complaint herein, coming on regularly this day to be heard, Messrs.

King and Shaw appearing as counsel for plaintiff, and A. N. Drown, Esquire, appearing as of counsel for defendant, Jno. Brickell, thereupon after argument by respective counsel, it is ordered that said demurrer be and it is hereby sustained as to not stating facts, and overruled as to misjoinder of parties defendant, with ten days' leave to amend.

In open court, October 13, A. D. 1893.

Judgment.

(Title of Court and Cause.)

In this cause, John Brickell, one of the defendants, having
34 heretofore demurred to the complaint of the plaintiff herein, and the issue of law raised by said demurrer having been duly heard and tried and determined by this court, and an order or decision having been heretofore duly made and entered herein sustaining the said demurrer, and giving to the plaintiff ten (10) days' time wherein to amend his said complaint; and due proof having been made that notice of said decision or order has been duly served upon said plaintiff, that the time so given him has elapsed, and that he has wholly failed and neglected to amend the complaint herein, upon motion of A. N. Drown, Esq., attorney for said defendant, John Brickell, it is ordered that this action be and the same is hereby dismissed as to said defendant, John Brickell, and that judgment of dismissal be entered herein, in favor of the said defendant, and that said defendant also have judgment for his costs and disbursements herein, to be taxed.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that Fairfax H. Wheelan, as the administrator of the estate of John H. Baker, deceased, plaintiff herein, do take nothing by this his said action as against John Brickell, defendant therein; that judgment of dismissal be, and the same is hereby, entered herein in favor of said defendant, John Brickell and against said plaintiff; and that
35 said defendant do have and recover of and from said plaintiff his costs and disbursements herein, taxed at four dollars.

Judgment recorded November 4th, 1893—B. 15, p. 407.

Clerk's Certificate to Judgment-roll.

(Title of Court and Cause.)

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

I, M. C. Haley, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause, and recorded in Judgment Book 15 of said court, at page 407.

And I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said cause.

Witness my hand and seal of said superior court this 4th day of November, A. D. 1893.

[Seal of Superior Court.]

M. C. HALEY, *Clerk*,
By FRANK NORTON,
Deputy Clerk.

Notice of Appeal.

(Title of Court and Cause.)

You will please take notice that the plaintiff in the above-
36 entitled action hereby appeals to the supreme court of the State of California from the judgment therein entered in the said superior court on the 4th day of November, 1893, in favor of the defendant John Brickell in said action and against said plaintiff, and from the whole thereof.

Dated this 13th day of November, 1893.

KING & SHAW,
Attorneys for Plaintiff.

To the clerk of said superior court and A. N. Drown, Esq., attorney for defendant John Brickell.

(Endorsed:) Filed Nov. 13, 1893. M. C. Haley, clerk, by J. M. Sullivan, deputy clerk.

Service and receipt of a copy of the within is hereby admitted this 13th day of November, 1893.

A. N. DROWN,
Attorney for Defendant John Brickell.

Stipulation.

(Title of Court and Cause.)

It is hereby stipulated that the foregoing is a full, true and correct transcript on appeal from the judgment in favor of the defend-
ant, John Brickell, in the above-entitled action, and that a
37 good and sufficient undertaking on appeal, both staying execution and for costs in due form of law, was on the 13th day of November, 1893, duly filed in said action.

Dated 22d day of Nov., 1893.

KING & SHAW,
Attorney- for Appellant.
A. M. DROWN,
Attorney for Respondent.

Clerk's Certificate to Transcript.

(Title of Court and Cause.)

I, M. C. Haley, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court

in and for said county, do hereby certify that I have compared the foregoing transcript on appeal with the original papers in the above-entitled action now on file in my office, and with the orders therein made and entered in the minutes of said court, and that the said transcript is a full, true and correct copy thereof.

38 I further certify that a good and sufficient undertaking on appeal, both staying execution and for costs, and in due form of law, was, on the 13th day of November, A. D. 1893, duly and properly filed in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said superior court, this — day of ——, 1893.

—— ——, *Clerk.*

Due service of a copy of the within transcript is hereby admitted this 23rd day of Nov., 1893.

A. N. DROWN,
Attorney for Respondent.

39 In the Supreme Court of the State of California, Dep't One.

FAIRFAX H. WHEELAN, Administrator, etc., Appellant,
vs.
JOHN BRICKELL *et al.*, Respondents.

By the COURT—Harrison, J.; Van Fleet, J.; Dehaven, J., concurring:

This is an action by Fairfax H. Wheelan, administrator of the estate of John H. Baker, deceased, to quiet the title of the estate of the said John H. Baker, deceased, in and to certain lands, known as outside lands, situate and being within the present limits of the city and county of San Francisco; to have said lands restored to the possession of said estate for administration and distribution; to recover damages from defendant as and for the value of the use and occupation, rents, issues, and profits thereof, etc.

Defendant interposed a demurrer to the complaint on several statutory grounds, among which was that the complaint did not state sufficient to constitute a cause of action.

The demurrer was sustained by the court below, and plaintiff having declined to amend his complaint within the time and pursuant to the leave for that purpose granted, his default was

40 duly entered and final judgment for costs was entered in favor of defendant, from which judgment plaintiff appeals.

The questions arising on the appeal in this case are substantially the same as those considered by this court in the action No. 15074, between the same parties, decided June 10, 1893 (not reported in California reports, but see vol. 5, p. 201, Cal. Dec., and 33 Pacific Reporter, p. 396), and in Baker *vs.* Brickell, 87 Cal., 329.

What was said in Wheelan *vs.* Brickell, No. 15074, will apply with equal force here, and upon the authority of that case and of Baker *vs.* Brickell, 87 Cal., 329, the judgment appealed from is affirmed.

41 [Endorsed:] Supreme court of the State of California. Fairfax H. Wheelan, appellant, *vs.* John Brickell *et al.*, respondents. Opinion. King & Shaw, attorneys for pl'ff, Pacific Mutual building, 508 Montgomery St., San Francisco.

42 In the Supreme Court of the State of California, Dep't One.

FAIRFAX H. WHEELAN, Adm., Appellant,
vs.
JOHN BRICKELL *et al.*, Respondent-. } No. 15557.

On appeal from the superior court in and for the city and county of San Francisco.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same is hereby, affirmed.

43 [Endorsed:] No. —. In the supreme court, State of California. Remittitur. —— —— *vs.* —— ——. Clerk's costs, $—. Paid by appellant, $—. Paid by respondent-, $—. Total, $—. T. H. Ward, clerk, by —— ——, deputy.

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of California, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Fairfax H. Wheelan, administrator, etc., plaintiff, and John Brickell *et al.*, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Fairfax H. Wheelan, administrator, etc., as by his complaint ap-

appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given,
45 that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 27th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California,
By W. B. BEAIZLEY,
Deputy Clerk.

The above writ of error is hereby allowed.
STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

46 [Endorsed:] Supreme Court of the United States of America. Fairfax H. Wheelan, plaintiff in error, *vs.* John Brickell *et al.*, defendants in error. Writ of error. Filed Aug. 30, 1895. T. H. Ward, clerk, by A. W. Johnson, deputy. King & Shaw, attorneys for pl'ff in error, Pacific Mutual building, 508 Montgomery St., San Francisco.

47 In the Supreme Court of the United States.

FAIRFAX H. WHEELAN, Administrator, etc., Plaintiff in Error,
vs.
JOHN BRICKELL *et al.*, Defendants in Error.

To John Brickell, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California wherein Fairfax H. Wheelan is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 28th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

48 In the Supreme Court of the United States.

FAIRFAX H. WHEELAN, Adm'r, &c., Plaintiff in Error,
vs.
JOHN BRICKELL *et al.*, Defendants in Error.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit, Northern District of California,
State of California, City and County of San Francisco, } *ss:*

On this third day of September, A. D. 1895, personally appeared B. J. Akerman before me, Thos. E. Haven, the subscriber, a notary public in and for said city and county of San Francisco, State of California, duly commissioned and sworn, and makes oath that, and, being by me first duly sworn, deposes and says that, he is and was at all the times hereinafter stated a white male citizen of the United States over the age of twenty-one years and is not and never was a party to the above-entitled action in any way; that on the 31st day of August, A. D. 1895, and at all the times herein mentioned A. N. Drown was and still is the attorney of record in said action and matter for the defendant in error John Brickell; that on said day and for a long time prior thereto said Drown had and still has a law office in said city and county, and also a residence and dwelling-house in said city and county and a family; that on said 31st day of August, 1895, said Drown was absent from his said office and also from his said residence and also from said city and county during all of said day; that on said 31st day of August, 1895, and at and in said city and county this deponent personally served the annexed citation upon said A. N. Drown by personally leav-
49 ing a full, true, and correct copy of said citation for him and at the said residence and dwelling-house of said Drown in said city and county, to wit, No. 2550 Jackson street, in said city and county, with an adult person, to wit, Mary Kristensen, who then was a member of and a resident in the family of said Drown and was then and there present in said dwelling-house, all on said 31st day of August and in said city and county, State and district.

And deponent further says that on said 31st day of August, 1895, Jennie A. Brickell and Louise D. Brickell were and still are the executrices of the last will of said John Brickell, the defendant in error, who died before said August 31st, 1895, and that John Clinton Brickell was on said day and still is executor of said last will, and that on said 31st day of August, 1895, in said city and county, State and district, this deponent personally served said annexed citation on said Louise D. Brickell, executrix, and as such executrix by personally delivering to and leaving with her personally a full, true, and correct copy of said citation on said 31st day of August, 1895, at said city and county and in said district and State.

And deponent further says that on said 31st day of August, 1895, and for a long time prior thereto said Jennie A. Brickell and John Clinton Brickell had and still have a residence and a dwelling-house in said city and county, and with said Louise D. Brickell were and still are a family, and living together as such, with others in the

family; that on said 31st day of August, 1895, said Jennie A. Brickell and John Clinton Brickell were each absent from said residence when deponent called thereat between the hours of one o'clock in the afternoon and six o'clock in the afternoon of that day
50 for the purpose of serving said citation on them and each of them; that deponent, at said city and county, district and State, on said 31st day of August, 1895, personally served the annexed citation upon each, respectively, the said Jennie A. Brickell, executrix, and as executrix of the last will of John Brickell, the defendant in error, then deceased, and John Clinton Brickell, executor, and as such executor of the last will of John Brickell, the defendant in error, then deceased, by personally leaving for each of them, respectively and separately, a full, true, and correct copy (to wit, two such copies altogether, one for each) of said citation at the said residence and dwelling-house of said Jennie A. Brickell and John Clinton Brickell in said city and county, to wit, No. 1023 Green street, in said city and county, with an adult person, to wit, Louise D. Brickell, who then was a member of and a resident in the family of each, respectively, said Jennie A. Brickell and John Clinton Brickell, and was then and there present in said dwelling-house, all on said 31st day of August, 1895, and in said city and county, State and district.

B. J. AKERMAN.

Subscribed and sworn to before me this 3rd day of September, A. D. 1895.

THOS. E. HAVEN,

[SEAL.] *Notary Public in and for the said City and County of San Francisco, State of California.*

51 [Endorsed:] Supreme Court of the United States of America. Fairfax H. Wheelan, plaintiff in error, *vs.* John Brickell *et al.*, defendants in error. Citation. Copy. King & Shaw, attorneys for pl'ff in error, Pacific Mutual building, 508 Montgomery St., San Francisco.

52 In the Supreme Court of the United States.

FAIRFAX H. WHEELAN, Administrator, etc., Plaintiff in Error,
vs.
JOHN BRICKELL *et al.*, Defendants in Error.

Know all men by these presents that we, Chas. N. Fox and M. B. Kellog, both of the city and county of San Francisco, State of California, are held and firmly bound unto the said John Brickell, his heirs, executors, administrators, and assigns, in the full and just sum of five hundred dollars, to be paid to the said John Brickell, his heirs, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of August, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a session of the supreme court of the State of California, in a suit pending in said court between John Brickell and Fairfax H. Wheelan, a final judgment and decree were
53 rendered against the said Fairfax H. Wheelan, and the said Fairfax H. Wheelan having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment and decree in the aforesaid suit, and a citation directed to the said John Brickell, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Fairfax H. Wheelan shall prosecute said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation — be void; else remain in full force and virtue.

CHAS. N. FOX.
M. B. KELLOGG.

Sealed and delivered in the presence of—
A. E. SHAW.

Approved by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Chas. N. Fox and M. B. Kellogg, the sureties named in the above bond, being duly sworn, each for himself says that he is a freeholder and resident within this State and is worth double the said sum of five hundred dollars, the penalty named in said bond, over and above his debts and liabilities, exclusive of property exempt from execution.

CHAS. N. FOX.
M. B. KELLOGG.

54 Subscribed and sworn to before me this 27th day of August, A. D. 1895.

THOS. E. HAVEN,
[SEAL.] *Notary Public.*

The above bond is approved, both as to its form and sufficiency. Dated this 28th day of August, A. D. 1895.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

55 [Endorsed:] Supreme Court of the United States of America. Fairfax H. Wheelan, plaintiff in error, *vs.* John Brickell *et al.*, defendants in error. Bond. Copy. King & Shaw, attorneys for pl'ff in error, Pacific Mutual building, 508 Montgomery St., San Francisco.

56 In the Supreme Court of the United States.

FAIRFAX H. WHEELAN, Administrator, etc., Plaintiff in Error,
vs.
JOHN BRICKELL *et al.*, Defendants in Error.

In error to the supreme court of the State of California.

Now comes the plaintiff in error and for assignment of error in this case alleges that the supreme court of the State of California in giving its decision and judgment in the above-entitled cause did commit error as follows, to wit:

Assignment of Error No. I.

The said supreme court by its decision and judgment erred in finding, adjudging, and decreeing that Maria Baker, although in possession of the lands of John H. Baker, deceased, as the administratrix of his estate, was the beneficiary under the act of Congress of March 8, 1866, and that she was entitled to take a deed of said lands and premises in her own right from the city of San Francisco and its successor, the city and county of San Francisco, to the exclusion of creditors and the other heirs of said deceased.

57 *Assignment of Error No. II.*

The said supreme court erred in finding for the defendant Brickell and granting judgment in his favor, for that by the provision of said act of Congress of March 8, 1866, the heirs of the said J. H. Baker, deceased, and not the said Maria Baker in her own right, were and are the beneficiaries under the said act of Congress, and thereunder are also the owners of said land and entitled to a conveyance thereof from the said city of San Francisco and its successor, the city and county of San Francisco.

Assignment of Error No. III.

The said supreme court erred in its judgment and decision, for that the said deed by the city and county of San Francisco to the said Maria Baker created in her a trust as to all said realty for the use and benefit of said heirs as beneficiaries, but said court denied and decided against said trust and trust relationship and refused any relief to said heirs and adjudicated and decided that said trust did not exist.

Assignment of Error No. IV.

The said supreme court erred in its decision and judgment, for that the said plaintiff in error, as administrator under the laws of the State of California, is entitled to the possession of said realty, but said court denied his right to recover said lands for the estate and said heirs, and refused him the right of possession of said lands,

and for that the said John H. Baker in his lifetime was the owner of all said realty and died as the owner thereof, with no adverse
58 claim existing against his said ownership as to said realty, and for that at his death, which was before the passage of the said act of Congress of March 8th, 1866, the title to all said realty vested in his heirs, subject to administration, and for that the said Maria Baker (which is the same person referred to in all this record as Maria Baker Batchelder), upon the death of said John H. Baker, took possession of all said property as administratrix, and was administratrix of the estate of John H. Baker, and for that she never in her own right took possession of any of said property or realty or claimed the same in her own right, but always recognizing the rights of the heirs, executors, administrators, and personal representatives of said John H. Baker, deceased, but said supreme court denied as aforesaid and decided against this plaintiff in error as such administrator of the estate of John H. Baker, deceased, and against the ownership of said heirs of said John H. Baker, deceased, in and to said realty or any part thereof.

Assignment of Error No. V.

The said supreme court erred in its judgment and decision, for that by said findings and judgment the said superior court in and for the city and county of San Francisco and the supreme court of the State of California refused to plaintiff the benefits of the provisions of said act of Congress in his favor, and refused to be governed by said provision in determining the rights of this plaintiff, and the said supreme court decided against the right, title, and interest of this plaintiff under said act of Congress.

59 Wherefore the plaintiff in error prays that the said judgment of the supreme court of the State of California against him, rendered on the 29th day of September, 1894, may be reversed and that judgment be entered for plaintiff in error with costs.

CHAS. N. FOX,
KING & SHAW,
Attorneys for Plaintiff in Error.

60 [Endorsed:] Supreme Court of the United States of America. Fairfax H. Wheelan, plaintiff in error, *vs.* John Brickell *et al.*, defendants in error. Assignment of error. Copy. King & Shaw, attorneys for pl'ff in error, Pacific Mutual building, 508 Montgomery St., San Francisco.

61 In the Supreme Court of the State of California.

FAIRFAX H. WHEELAN, Administrator, etc., Plaintiff in Error,
vs.
JOHN BRICKELL, Defendant in Error.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the foregoing printed and written

pages contain a full, true, and correct transcript of all proceedings in the above-entitled cause, and that the same constitute the returns to the annexed writ of error, and that said transcript contains all the proceedings, pleadings, and papers contained in the record of said cause, upon which said cause was heard and tried in the supreme court of the State of California, and also contains the opinion of said supreme court of the State of California, the judgment of said supreme court of the State of California, the writ of error, a copy of the citation, a copy of the bond given by the plaintiff in error, and a copy of the assignment of errors.

And I further certify that the plaintiff in error lodged with me, as clerk of the said supreme court of the State of California,
62 in said office, a copy of said writ of error for the defendant in error in said cause.

Witness my hand and seal of the said supreme court of the State of California this 10th day of September, A. D. 1895.

[Seal Supreme Court of California.]

T. H. WARD,
Clerk of the Supreme Court of the State of California,
By A. W. JOHNSON,
Deputy Clerk.

63 [Endorsed:] Supreme court of the State of California. Fairfax H. Wheelan, plaintiff in error, *vs.* John Brickell, defendant in error. Clerk's certificate. King & Shaw, attorneys for pl'ff in error, Pacific Mutual building, 508 Montgomery St., San Francisco.

Endorsed on cover: Case No. 16,039. California supreme court. Term No., 346. Fairfax H. Wheelan, administrator, &c., plaintiff in error, *vs.* John Brickell. Filed September 28th, 1895.

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166-716

Defendant's Notice and Brief on his Motion to Dismiss for Want of Jurisdiction

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1896.

No. 346.

FAIRFAX H. WHEELAN, ADMINISTRATOR, &c.
JOHN BRICKELL, ET AL.

vs.

JOHN BRICKELL,

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY ..... 1897.

(16,039.)

In the Supreme Court of the United States.

FAIRFAX H. WHEELAN, as Administrator of the Estate of JOHN H. BAKER, Deceased,

Plaintiff in Error,

vs.

JOHN BRICKELL,

Defendant in Error,

AND ANOTHER.

No. 346,
October Term 1896.

Notice of Motion to Dismiss.

The plaintiff in error in the above entitled cause will please take notice, that at the opening of the Supreme Court of the United States, in the Capitol building in Washington, D. C., on Monday, March 1st, 1897, at 12 o'clock noon of that day, or as soon thereafter as the matter can be heard, the defendant in error, John Brickell, will move said Court to dismiss the pending writ of error in this cause, on the ground that the Court has not jurisdiction in the premises, there being no federal question in the record. With said motion will be used and submitted the following printed brief served on you herewith.

Respectfully,

S. W. HOLLADAY,
E. B. HOLLADAY,
A. N. DROWN,
J. H. MOORE,
Counsel for Defendant in Error.

San Francisco, January 27, 1897.

In the Supreme Court of the United States.

FAIRFAX H. WHEELAN, as Administrator of the Estate of JOHN H. BAKER, Deceased,

Plaintiff in Error,

vs.

JOHN BRICKELL,

Defendant in Error,

AND ANOTHER.

No. 346,
October Term, 1896.

Defendant's Brief on His Motion to Dismiss for Want of Jurisdiction.

This is a motion by defendant in error, to dismiss the writ of error herein, on the ground that the record contains no federal question, and that, therefore, this Court has no jurisdiction.

The case comes from the Supreme Court of California.

In the trial Court Wheelan, exr., etc., was plaintiff; Brickell was defendant. (Page 1, original paging.) Brickell's demurrer to the complaint was sustained, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. (Original page 33-4.)

Plaintiff failed to amend his complaint, and judgment was entered for defendant, adjudging that plaintiff take nothing by this action. (Page 34.)

Upon appeal, the Supreme Court of California affirmed the judgment, (page 40) and plaintiff has sued out the present writ of error.

Consequently, if there is a federal question involved in this case, it must appear from the complaint, either by direct averment or by necessary intendment.

According to the complaint, the principal facts of the case are as follows:

One John H. Baker died, intestate in San Francisco, March 30, 1863. (Page 3.) This plaintiff was appointed administrator of his estate June 6, 1890, and letters were issued to him. (Page 1.)

The complaint then avers,

"That for a long time prior thereto, and until the time of his death, the said Baker was the owner and possessor and in full possession of the lands and premises hereinafter fully described and set forth in this complaint and known as the Golden Gate Rancho and Baker Rancho" (page 3.)

Towards the end of the complaint, and in evident fulfillment of this reference, fifteen parcels of land are separately described by metes and bounds and alphabetically designated from A, to O, inclusive, (pages 16-25.)

Such descriptions, however, do not indicate whether said lands so described are in the City and County of San Francisco, or even in the State of California.

John H. Baker's widow, Maria Baker, on May 3rd, 1863, received letters of administration upon his estate, and duly qualified thereunder. (Pages 3-4.)

No distribution of said estate has ever been made. (Page 5.)

In May, 1873, the widow Baker, administratrix, married David F. Batchelder, (page 8), and thereafter, between June, 1874, and February, 1877, said Maria Baker-Batchelder and David F. Bachelder, her husband, executed and delivered to this defendant, John Brickell, their joint and several promissory notes aggregating $42,500. (Page 8-9.) And to secure said promissory notes, said David F. Batchelder and Maria Baker Batchelder, his wife, executed mortgages to said John Brickell—mortgaging to him "all and singular the "lands and premises of said estate of John H. Baker, deceased, "herein before referred to, and hereinafter specifically described, "designated and mentioned." (Page 10-11.)

In June, 1878, Brickell began his action against Batchelder and wife to recover on the notes, and to foreclose the mortgages. (Page 12.)

"And the said John Brickell, in the prayer of his complaint, prayed for an order of sale of said LANDS IN SAID MORTGAGES MENTIONED." (Page 12.)

Such proceedings were had in said action that plaintiff therein (Brickell) recovered judgment for $62,300.27, and the Court gave its decree foreclosing said mortgages, "and ordering the LANDS IN SAID MORTGAGES MENTIONED to be sold," etc.

In pursuance of said judgment, the sheriff of San Francisco "sold all the right title and interest of said David F. Batchelder and Maria Baker Batchelder, his wife, in and TO ALL THE REAL PROPERTY IN SAID MORTGAGES MENTIONED," for the sum of $59,777. John Brickell was the purchaser; (page 14) and on July 15, 1879 "the sheriff's deed for ALL the said LANDS in SAID MORTGAGES MENTIONED so belonging to the estate of John H. Baker, deceased," was executed and delivered to said John Brickell.

"Thereupon said John Brickell entered into the actual possession of all of SAID LANDS, and he has by himself and his tenants ever since continued to use and occupy the same."

"Said John Brickell asserts and pretends to hold the legal title to all of said lands, under said mortgages, foreclosure, sheriff's deed and possession," and he holds the possession and claims the title adversely to said estate of Baker. (Page 15.)

The foregoing is a fair statement of all that there is in the complaint relative to the estate of Baker or to any of the lands of said estate.

In this, there is no reference to any federal question.

Elsewhere in the complaint, however, it is stated that on September 14, 1872, the widow Baker, while still administratrix, "filed her

petition with the clerk of the Board of Supervisors, of the City and and County of San Francisco, praying therein to obtain a grant and deed from said city, under the Act of Congress, approved March 8th 1866, entitled 'An Act to quiet the title to certain lands "within the corporate limits of the City of San Francisco,,' and Or-"der Eight Hundred of said Board duly approved January 14th, "1868, entitled'Order 800. An Order for the settlement and quieting "titles of lands in the City and County of San Francisco, situated "above high water mark of the Bay of San Francisco and the Pa-"cific Ocean, and without the former corporate limits of the City "of San Francisco', and the Act of the Legislature of the State of California, approved March 14th, 1870, entitled, 'An Act to exped-'iate the settlement of land titles in the City and County of San 'Francisco' ". (Page 5.)

"The said petition alleged that Maria Baker, the petitioner, was a widow, and was with her family of children in BONA FIDE actual possession of the LAND DESCRIBED IN SAID PETITION since the 11th of July, 1860, continuously up to the date of the filing of said petition with said Board, and continued to occupy said lands, and that her possession of said property through herself was complete, full undisputed and notorious, from the 11th day of July, 1860, up to the date of said petition."

In pursuance of said petition, a grant of all the right, title and interest which said city then had in SAID LANDS was made to Maria Baker by said Board; and thereafter, on January 9, 1873, a deed was executed by said City and County, by the Mayor, to said Maria Baker, of said land, purporting to convey to her all the title the City then had therein.

With reference to this petition and the land obtained thereunder by Mrs. Baker, it will be noticed, that the complaint does not anywhere DESCRIBE the land for which she petitioned, or which she so obtained. In alleging the substance of her petition, the land of which she said she had been in possession is "the land described in said petition."

The grant which the Board made to her under said petition, granted to her "SAID LANDS"; and the deed to her by the city was a deed "OF SAID LAND."

So that the averments of the complaint upon this subject, merely go to show that the widow Baker petitioned to the Board of Supervisors for a grant of some land. It was land which she, herself, had been in the actual possession of for many years, and the City of San Francisco made to her its deed.

This part of the complaint, however, has no relation to the other part which deals with the land of which John H. Baker was the owner and which he left in his estate.

Thus there are two distinct parts in the complaint; one treats of the acts of the widow in mortgaging, to secure her personal obligation, lands which her deceased husband owned, and which were part of his estate, and which she, as executrix, ought to have administered upon regularly. The other part merely sets out how the widow obtained from the City some land on her own account. This land which she obtained from the City, is not alleged to be the land

which her husband owned—it is not stated to have had any relation with his estate. It is not even DESCRIBED in any manner.

From what appears in the complaint, the land became and was her own private property, by title acquired after the death of her first husband. As to that land, this plaintiff, John H. Baker's administrator, has nothing to do, and it does not appear that such land was ever mortgaged to Brickell or ever foreclosed by him, or that he has any interest in it.

Brickell demurred to this complaint that it does not state facts sufficient to constitute a cause of action.

The Court below sustained the demurrer.

Plaintiff failed to amend and judgment final, "that plaintiff take nothing by this action" was entered.

That judgment was affirmed by the State Supreme Court.

Where is the federal question?

In sustaining that demurrer, was it necessary for the Court to pass upon any federal question?

We are elsewhere advised, that plaintiff wishes to have it appear, that he claims a title to land under the Act of Congress, approved March 8th, 1866, entitled "An Act to quiet the title to certain lands "within the corporate limits of the City of San Francisco," and that the State Court has decided against said claim.

Where, in the complaint, can anything be found which would suggest such a claim?

The Act of Congress aforesaid is mentioned once in the complaint; mentioned by mere recital.

It is alleged that the widow Baker "filed her petition with the clerk of the Board of Supervisors of the City and County of San Francisco, praying therein to obtain a grant and deed from said city under the Act of Congress"—and under Order 800 of the Board, and under an act of the State Legislature.

This vague recital is of no legal consequence here—for the widow obtained the deed for that land as her own private property. It was an acquisition of hers with which the estate of her then deceased husband had no concern and with which Brickell appears to have no concern.

If, on the other hand, we turn to the other part of the complaint, and carefully follow the recital of how the widow married a second time, and with her second husband, mortgaged lands which were still a part of the estate of the first husband, we are still at a loss for a federal question.

The legality or illegality of a widow's act, in mortgaging the land of her deceased husband's estate, is a matter to be settled in the Courts of the State where it occurs.

Whether the mortgagee acquires a good title under foreclosure, as against the heirs is also a question of local laws.

It is not claimed that the title of the estate of Baker, deceased, arose under the Act of Congress of March 8, 1866. It could not be so claimed since the complaint itself asserts that Baker, in his lifetime, was the owner of the land there described, and Baker died March 30, 1863. Again, the Specifications of Error distinctly aver, as to the land now claimed by this administrator as belonging to Baker's estate, that Baker owned them in his lifetime.

This perfect title in Baker himself, prior to the Act of Congress, of course, excludes the possibility of this administrator claiming anything as coming to the estate by reason of said Act.

But, the briefest argument is, that the complaint does not make any such claim.

For these reasons it must be plain to one who examines this record, that the complaint does not contain anything which can be twisted into a federal question by any possible ruling of a Court.

Next, the decision itself, shows not the first trace of creating a federal question. The judgment, which is, "that plaintiff take nothing by this action," does not decide against any right or title set up under any Act of Congress.

When we remember, that the lands said to have belonged to Baker, and which now belong to his estate are not located in any city or county or State, and the lands for which the widow Baker sought and obtained a deed, are NOT DESCRIBED AT ALL. When we notice that the city-deed lands are not said to be any part of the Baker estate lands, and the Baker estate lands are not alleged to have any identity with the city-deed lands; and since the city-deed lands are not even alleged to belong to Baker's estate; we are not at any loss to see why the trial Court sustained the demurrer and after default gave judgment for defendant.

But even if the foregoing were not sufficient to support the motion, it must still be granted upon the ground that there was no Federal question involved in the case which was presented to the highest court of the State for decision.

If this Court is to entertain the appeal, it must find in the record some one, at least, of the grounds of jurisdiction specified in Sec. 709 of the Revised Statutes. But none of them are there. However much the judgment appealed from may be examined, from whatever point of view it is considered, it is conclusively apparent that by that judgment there was not (a) drawn in question the VALIDITY of any statute of the United States; nor was there pronounced (b) a decision AGAINST THE VALIDITY of such a statute; nor was there (c) drawn in question the validity of any Statute of the State of California, or any authority exercised under that State, on the ground that such Statute or authority was REPUGNANT TO the Constitution or laws of the United States; nor was a decision made (d) IN FAVOR OF THE VALIDITY of such State authority or Statute; nor was a decision had (e) AGAINST any title or right specially set up or claimed by either party under the Constitution or Statutes of the United States. If this be so, it follows that there is here no final judgment or decree which this Court can re-examine and affirm or reverse upon writ of error.

There was in fact nothing before the Supreme Court of the State, and nothing was passed upon or determined by that Court, except A SIMPLE QUESTION OF PLEADING. In the lower court the Complaint had been demurred to by the defendant, John Brickell, on various grounds, and the demurrer thereto had been sustained on the ground that the Complaint did not state facts

sufficient to constitute a cause of action. Due notice having been given of the sustaining of the demurrer, and the plaintiff having failed to amend, judgment for said defendant on the demurrer was duly entered. It is from that judgment that the appeal was taken to the Supreme Court of the State, and it was that judgment which the highest Court of the State affirmed.

The decision of the lower State Court was primarily that the plaintiff's complaint did not state facts sufficient to constitute a cause of action—which, as before stated, was purely the decision of a question of pleading.

It involved also, as a matter of course, the decision of an issue of law between the plaintiff and ONE of the defendants to-wit: John Brickell. There were other defendants joined with him in the Complaint, but the litigation was pursued only as to him. He alone appeared and demurred, and the judgment upon the issue of law was in his favor and to the effect "that Fairfax H. Wheelan, "as administrator of the estate of John H. Baker, deceased, "plaintiff herein, do take nothing by this his said action as against "John Brickell, defendant herein; that judgment of dismissal be "and the same is hereby entered herein in favor of said defendant "Brickell and against said plaintiff."

The judgment or decree of the State Supreme Court, which it is now sought to review, was therefore, simply a decision that taking the material allegations of the Complaint—such allegations of FACT (not matters of law or legal conclusions) therein as were issuable and well pleaded—to be true, they did not state any cause of action in favor of the plaintiff, as against the defendant Brickell.

Now, whether that question of pleading or that issue of law was correctly or incorrectly decided, after applying thereto the peculiar rules of pleading which maintain in California, we respectfully submit that the decision of the highest court of the State thereon is not the proper subject of review here. The determination of it involved no Federal question. It could be, and, as matter of fact, was disposed of without any reference to or consideration of any provision of the Constitution or statutes of the United States.

THE PLAINTIFF'S RIGHT WAS NOT BASED UPON ANY FEDERAL STATUTE, CONSEQUENTLY THE DECISION AGAINST PLAINTIFF'S RIGHT WAS NOT AGAINST ANY TITLE OR RIGHT SET UP OR CLAIMED BY THE PLAINTIFF UNDER SUCH CONSTITUTION OR STATUTES.

There was no right or title alleged in the Complaint in this action under the Constitution or Statutes of the United States. The language of the Revised Statutes is "SPECIFICALLY set up or claimed." The Complaint contains no such specific averment. On the contrary its whole purport and showing is, that the plaintiff's right, whatever it was, grew up and had to be maintained independently of the Constitution or Statutes of the United States.

The action is to quiet title. The application for restoration of

possession is merely an incident to that action. [1] The chief averment of the Complaint, which is also the primary ground of the plaintiff's action is "that for a long time prior thereto and until the time of his death, the said Baker was the OWNER and possessor and in full possession of the lands and premises hereinafter fully described and set forth in this Complaint." From this averment arises the title which the plaintiff sets up and seeks to have quieted.

And the purpose of the action is declared in the prayer of the Complaint to be, to "quiet the title of THE ESTATE OF THE "SAID JOHN H. BAKER, DECEASED, in and to all the lots, "tracts and parcels of land hereinabove described and mentioned," and to "restore the possession of said lands to THE ESTATE OF "SAID JOHN H. BAKER, DECEASED, and to plaintiff, as such "administrator, FOR THE PURPOSE OF ADMINISTRATION OF "SAID ESTATE", and that "plaintiff, as such administrator, have "such other and further relief for and on behalf of said ESTATE OF "SAID JOHN H. BAKER, DECEASED, as to equity appertains "and belongs."

The plaintiff in the action, and the plaintiff in error here, is the ADMINISTRATOR of the estate of John H. Baker, deceased. It is evident, and it is also established as matter of law that in that capacity he could only set up and litigate THE RIGHTS OF HIS DECEDENT; and that he could only assert and quiet JUST SUCH TITLE as his decedent had AT THE TIME OF HIS DEATH in or to the lands in question. AS ADMINISTRATOR, the plaintiff neither took nor held nor could transmit any title to the real property of his decedent. By the Statutes of the State he was permitted and required to take POSSESSION of the real estate which belonged to his decedent, and by virtue of the same statutory enactments his possession was made sufficient to enable him to bring suit to quiet the title hereto against adverse claims.[2] But even his possession was merely for the purposes of administration. He could not in any way interfere with the TITLE unless by proceedings had, pursuant to the Statute[3] for the purpose of selling the real estate for payment of debts, family allowance and expenses of administration. The title, therefore, upon which the administrator of the estate of John H. Baker must have recovered in this action, if at all, was NOT HIS OWN TITLE, but that of the intestate. 1. The seizin upon which he must have relied was the seizin which the deceased had at the time of his death. Had there been an answer filed, it could only have put in issue that title and that seizin. And if there had been a trial, the judgment resulting therefrom would have only determined the sufficiency of that title and that seizin.

Of necessity the official authority of an administrator must be confined to the estate, the precise property, real and personal, which the decedent had and let fall from his hands when death overtook him. The assets which pass to the representa-

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[1] Landregan vs. Peppin, 94 Cal. 465.
[2] Theller vs. Such, 57 Cal. 459.
[3] Code Civ. Proc. Sec. 1581.

tives of decedents to be administered under the proper direction of the Probate Court, consist entirely of the actual estate of the decedent.[1] Whether the administrator be trustee of these assets for heirs or for creditors or for both, he receives and is chargeable with, and has to do with, only such property as the decedent could transmit to heirs or devisees.

Accordingly, we find that the plaintiff in this suit very properly limited his action and confined the allegations of his complaint to the title, if any, and such as it was, which John H. Baker had to the lands in question AT THE TIME OF HIS DEATH.

The Supreme Court of the State, therefore, was necessarily referred, and the plaintiff was accordingly confined by his own pleadings to the date of the death of John H. Baker, which was stated in the Complaint to be the 30th DAY OF MARCH, A. D. 1863. The decedent's title was fixed on that day, and he could transmit to his heirs, and his administrator could take cognizance of and administer upon, such title and such only as John H. Baker held on the 30th day of March, 1863. The "title of the estate of John H. Baker, deceased," to the lands in the Complaint mentioned is, and of necessity could be, only such title thereto as John H. Baker held on the 30th day of March, 1863.

What that title was, or whether John H. Baker had on the day of his death any title at all to any of the lands supposed to be referred to in the Complaint in this action, is, so far as the present question is concerned, wholly immaterial. The derivation of his title and the source of his ownership are nowhere alleged. They are not, and, as a matter of course, could not be, connected with or in any manner depend upon the only statute of the United States which is referred to or mentioned in the plaintiff's pleading. It is self-evident that John H. Baker's title or ownership on the 30th DAY OF MARCH, 1863—the day of his death—was not, and could not have been, derived under an Act of Congress passed three years afterwards. If, up to, and at the time OF the passage of that Act, the United States had the title, or any title, to the lands above mentioned, that title certainly could not have been in John H. Baker when he died. If, too, that Act conveyed the title of the United States to such lands to the City and County of San Francisco, in trust for the benefit of such of its inhabitants as were in existence and were also in the BONA FIDE and actual possession of the lands affected by the Act at the date of its passage, it requires no logic to show that John H. Baker, who had died years before, could not at or prior to the time of his death have been a beneficiary of the trust. Whatever, then, may have been the effect of the Act of Congress of March 8, 1866 it is impossible that John H. Baker's ownership of any land prior to or at his death in 1863, should have been derived from, or in any degree whatever contributed to by that Act. That Act did not attempt to exercise, and if it had, will not be

[1] Code Civ. Proc. Sec. 1536, et seq.

permitted to have, any such retroactive operation. If that Act was a present grant of the title, and if the United States had the title up to and at the time of the passage of that Act, and if that title was for the first time donated by the United States on March 6th, 1866, it follows, as was declared by the Supreme Court of California in BAKER vs. BRICKELL, 87 Cal., p. 340, that "John H. Baker had no title to this land. * * * He could not be the recipient of a grant. He had then departed this life and could take nothing by the Act of Congress passed on the day above mentioned."

Since therefore, the only title which could be litigated in this action was such as John H. Baker had at the time of his death; since, moreover this action was brought by the administrator of the estate of John H. Baker deceased, who could only assert and enforce such title as his decedent had at the time of his death; since, also, the cause of action and the prayer of the Complaint relate specifically and altogether to "the title of the estate of John H. Baker deceased," it follows, as an unavoidable conclusion that neither the Act of Congress of March, 1866, nor its validity were, or could have been, drawn in question in this suit or considered by the State Courts, either upon the trial or on the appeal, and also that there was, and could have been, no title or right set up in the action, or claimed by either party thereto, under that Act of Congress, or under the Constitution or Statutes of the United States, and that the decision of the Supreme Court of the State was not against, and did not even consider or pass upon, any title or right specially or otherwise set up or claimed by either party under such Constitution or Statutes.

THE DEFENDANT SET UP NO TITLE OR RIGHT UNDER ANY FEDERAL STATUTE. HE DID NOT ANSWER AND CONSEQUENTLY DID NOT SET UP OR LITIGATE ANY RIGHT WHATEVER.

There was no decision in favor of or against his title or right. The judgment, so far as the defendant Brickell was concerned was simply that he be not required to answer the plaintiff's complaint. The matter adjudicated was that, upon the PLAINTIFF'S own showing, he, as the representative of the deceased John H. Baker and as litigating the title which John H. Baker had when he died, had no cause of action against the defendant Brickell.

And even if the decision of this issue of law could be construed as an inferential determination that the defendant Brickell had the title, or a better title than the estate of John H. Baker; to the lands in question, that determination could not be considered QUO AD the plaintiff as being a decision by the State Court AGAINST a title or right "specifically set up or claimed" by the plaintiff under the Constitution or Statutes of the United States; nor could that decision be regarded QUO AD the defendant Brickell, as having first drawn in question the validity of a Statute of the United States, and then as having decided AGAINST the validity of such Statute. On the contrary, as before shown, the plaintiff, litigating in right of his decedent, did not and could not claim under any Federal Statute, and the decision in favor of the defendant Brickell—

even if it could be regarded as an adjudication that he had acquired and held the title which Maria Baker received under the Act of Congress of March 8th, 1866,—was not against, but IN FAVOR of, that title.

It is, however, conclusive of this discussion to say, that the defendant has not set up nor litigated any title or right, whether under Federal Statute or not. Neither has the plaintiff by any of the allegations of his complaint, litigated the defendant's right or title. The plaintiff, in a suit to quiet title, in the first instance and by his Complaint, is concerned with HIS OWN title and with that alone. He is required to allege title in himself; and the burden of proof is upon him to make that allegation good. If he fails to make out his case in this regard he cannot recover.[1]

If plaintiff had been able to sustain his complaint he would have been able to require the defendant to set forth by his answer whatever title he claimed, and to submit such claim of title to the determination of the Court. When the defendant should have answered, disclosing and declaring his right and title, he would have become an actor as to that right and title and have had upon him the burden of proof concerning it. Until then, the whole case must rest and depends upon the PLAINTIFF'S TITLE, as set forth in his complaint. The DEFENDANT'S TITLE is not involved in a determination of the sufficiency of the Complaint.

In no respect can the Complaint be regarded as assailing or bringing into question the Act of Congress of March 8th, 1866.

The sufficiency of Brickell's title is nowhere challenged or attacked. It is not claimed nor pretended that Maria Baker did not get, through the deed from the City, the title which the United States conveyed to the City by the Act of March 8th, 1866; nor that this title did not pass regularly and completely to Brickell through the mortgages which Maria Baker and her husband made to him and by virtue of the subsequent foreclosure of those mortgages and of the Sheriff's sale and deed pursuant to the decree of foreclosure. THE VALIDITY OF THE ACT OF CONGRESS OF MARCH 8th, 1866, OR ITS EFFECT AS A GRANT BY THE UNITED STATES OF ITS TITLE TO THE CITY AND COUNTY OF SAN FRANCISCO OF THE LANDS DESCRIBED IN THE COMPLAINT, IS NOT DRAWN IN QUESTION OR INVOLVED IN ANY CONTROVERSY BY THE PLAINTIFF.[2] Nor, indeed, is the regularity or effect of the proceedings of the Board of Supervisors under Order 800 of that Board, nor the execution or operation of the City deed anywhere impeached. The case is even stronger than HOADLEY vs. SAN FRANCISCO, 94 U. S. 4.

There is no dispute about the grant from the United States to the City. On the contrary, the validity of that grant is conceded, for both parties claim under it. Clearly then, this Court has no jurisdiction to review the decision and judgment of the State Court, as to

[1] Henry vs. Pesoli, 109 Cal. 53.
[2] Hastings vs. Jackson, 112 U. S. 233.

which of the parties to this action is entitled to the benefit of this valid title.

The only cause of action that can be inferred from the averments of the Complaint is directed towards charging the defendant Brickell AS A TRUSTEE OF THE TITLE derived through the City deed for the use and benefit of the estate of plaintiff's decedent. But even if this be considered to be the declared object of the action, and even if the averments of the Complaint were sufficient to establish such a trust, the decision upon the question of their sufficiency for that purpose would not involve any provision of the Federal Constitution nor the validity or effect of any Statute of the United States. It would be controlled by and depend entirely upon THE ORDINARY RULES AND PRINCIPLES OF EQUITY and would involve nothing else.

The burden of plaintiff's Complaint is (orig. p. 5) that at the time Maria Baker applied for and obtained the city deed she was "exercising her said office as the said administratrix of the said John H. Baker, deceased," under her appointment as such administratrix, made nearly ten years before.

It appears and is alleged (orig. p. 6) that she applied for this deed in her own right and upon the ground that she personally was in possession of the land at the date of the passage of the Act of Congress, and that the city deed ran to her in her own right and conveyed "to said Maria Baker all of whatever claim, right, title and interest the said City and County then had therein and thereto." But even if it were true as matter of law that by the taking of this deed in her own name she became a CONSTRUCTIVE TRUSTEE of the title thereby conveyed for the estate of which she was administratrix, and that by reason of notice or knowledge her grantee, Brickell also became and is chargable as constructive trustee of the title thus derived for the estate now being administered upon by the plaintiff—even if the extravagant, impossible and incongruous averment of the complaint were true wherein it is argued or claimed (orig. p. 7.) "that as matter of fact "said Maria Baker took the said steps, filed said petition and ob- "tained said grant and deed in her official capacity as the adminis- "tratrix of the estate of John H. Baker, deceased, and for the use, "benefit and behoof of said estate, and not in her individual capacity, "nor for her own private uses or purposes, and that Maria Baker "obtained said grant and deed IN TRUST and AS TRUSTEE for "the use and benefit of said estate of said John H. Baker, deceased, "but unintentionally and BY MISTAKE and inadvertence said "grant and deed was made to her as grantee in her own name instead "of in her official capacity, viz. to 'Maria Baker' instead of 'Maria "Baker as administratrix of the estate of John H. Baker, de- ceased' "—there still would be presented by the Complaint no constitutional question nor any question arising under or involving a Statute of the United States, but only and simply a question of PURELY EQUITABLE COGNIZANCE. Whether the Appellate Court of California resolved this question correctly or incorrectly, it certainly does not furnish a proper ground of appeal, nor does it constitute a proper subject for examination or review by this tribunal.

The alleged trust does not spring from the Act of Congress, neither does it arise from any of the provisions contained in the City deed. It is deduced entirely from the duties and obligations which it is claimed were imposed by law upon the administratrix. And it would result as well from the purchase or acquisition by this administratrix of any outstanding title to lands of her decedent from whatever source derived. In other words, it depends for its origin and character upon the general doctrines of equity and has no tinge or color of a Federal question. What amounts to a trust, or out of what facts a trust may spring, are not Federal questions; and on a writ of error to a State Court they cannot be reviewed by this tribunal.[1]

THE STATE COURT DID NOT CONSIDER NOR DECIDE ANY FEDERAL QUESTION.

Whatever may be claimed for plaintiff's complaint or for the issue of law raised thereon, it yet remains that the highest Court of the State in disposing of the appeal in this case did not discuss nor determined any question growing out of or involving the Federal Statutes or Constitution. Whatever may seem to have been involved in the appeal, and whatever might have been passed upon by the Appellate Court of the State on that appeal it is clear that what that Court did actually decide was merely a question of general law.

It is well established that this Court has no jurisdiction to review a judgment of the highest court of the State, unless a Federal question has been decided by that Court against the plaintiff in error.[2]

The judgment of the Supreme Court of California was, as has been stated, simply an adjudication that the Complaint was not sufficient in law to entitle the plaintiff to the relief sought. The reasons of its decision are set forth in the opinion appearing on p. 18 of the record of the transcript herein.

As appears from the foregoing opinion, this action was merely the repetition of a former suit between the same parties, in which the Complaint was an exact duplication of that presented in this record and in which there was the same demurrer, the same ruling and the same judgment by default. The opinion of the Supreme Court of California on the appeal in the first action was as follows:

"This case has been here in various forms several times. Brickell v. Batchelder, 62 Cal., 623; Batchelder v. Brickell, 75 Cal., 373, 17 Pac. Rep. 441; Batchelder v. Baker, 79 Cal. 266, 21 Pac. Rep. 754; and Baker v. Brickell, 87 Cal., 329, 25 Pac. Rep. 489, 1067. The case at bar must be affirmed upon the authority of the case last above mentioned, 87 Cal. 329, 25 Pac. Rep. 489, 1067. That case, it is true, was decided upon its merits, after a full trial, while in the case at bar judgment was rendered for defendants upon the sustaining of a demurer to the complaint. There is an effort her to give the case a somwhat different phase, but it readily appears upon the face of the complaint

[1] Smith vs. Adsit, 23 Wall. 368.

[2] San Francisco vs. Itsell, 133 U. S. 65; Eustis vs. Bolles, 150 U. S. 364.

[3] vid. 38 Pacif. Reporter, p. 85.

that the material facts stated are the same as those passed upon in Baker v. Brickell. After a careful consideration of the briefs of counsel for appellants, we are satisfied that the complaint does not state facts sufficient to constitute a cause of action, and we do not think that further discussion of the case is necessary.

The judgment is affirmed."[1]

In both of these opinions the State Court bases its ruling mainly if not altogether on its decision of the case of BAKER vs. BRICKELL, appearing in 87 Cal. Rep., p. 329. By a reference to this case it will appear that all of the pretended equities attempted to be set up, and all of the grounds of action relied upon by the plaintiff in his complaint in this action were negatived and completely disposed of upon the general principles of law, irrespective of any provisions of the Federal Constitution or Statutes.

The suit of BAKER vs. BRICKELL was brought by one of the heirs of John H. Baker, deceased; and its purpose, as stated by the Supreme Court of California (p. 332) was to establish a trust against defendant Brickell, touching the same lands which are described in the complaint in this record. The administrator in this action could not, as a matter of course, set up any better or different right than that held by the heirs. Indeed, he is only permitted to enforce just such rights as the heirs took from their ancestor. When suing in the right of his decedent the administrator is simply asserting, as trustee of the heirs, the title which devolved upon them at the time of their ancestor's death. What was said, therefore, touching the heir by the Court in BAKER vs. BRICKELL, applies in full force to the plaintiff here. The judgment and opinion of the State Court (p. 340) was as follows:

"IN NO EVENT would any trust arise here in favor of any of the "children, issue of the marriage of Maria Baker and her husband "John H. Baker. The plaintiff could have no claim to any portion of "the land. THERE IS NOTHING ON WHICH TO BUILD A "TRUST. A trust arises from contract or from circumstances which "affect the conscience of a party, and charge him with the rights of "another. Here there was no contract between Maria and John H. "Baker constituting a trust, and no circumstances affecting the con-"science of Maria Baker, charging her with any duty to her children "in regard to the lands in suit. * * * She owed no duty to her "children save support, maintenance and education—none in regard "to this land."

"and was appointed administratrix of John H. Baker, and put the "land in suit in the inventory returned by her to the Probate Court "as assets of her intestate's estate and entered on the administration "of the estate are entirely immaterial. We are aware of no law by "which a person appointed administrator loses his land by so acting.

"There is no estoppel on Maria Baker to claim her own property "under such circumstances. * * * It is useless to dwell "on the points adverted to in relation to the administration, which "are totally immaterial and cannot in any proper view of them affect "the decision of this case."

[1] vid. 33 Pacif. Reporter, p. 397.

Such being its opinion touching the facts or circumstances upon which the plaintiff depended for his recovery in this action, the State Court logically and of necessity decided and adjudged that the Complaint herein did not state facts sufficient to constitute a cause of action. And this ruling disposed of the whole case.

That this ruling did not involve or decide any federal question is too plain for argument. It determined a question of general law only, in nowise depending upon the Constitution, treaties or Statutes of the United States.[1] And even if there had been lurking somewhere in the case something that might hav been claimed to have the complexion of a Federal question, it is equally plain that such Federal question was not raised, and has not been decided. It is still plainer, if such a thing were possible, that the decision of such, or of any, Federal question was not necessary to the decision or judgment which was rendered by the State Court in this case. Moreover, it is true, that whatever other questions might have been raised or decided, and that whatever other questions, even Federal questions, existed or were decided, the non-Federal question which was decided by the State Appellate Court was and is broad enough and sufficient to sustain the judgment which is now, ought to be reviewed.[2]

The rule has long since become settled that to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision to the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it.[3]

If it were necessary, we could sustain the decision of the State Court upon many other grounds wholly foreign to any federal statute. We will only mention one and that is ample to justify the disposition, which was made by the State Court of the plaintiff's complaint.

It has been repeatedly and invariably held by the Supreme Court of California—and it is the general law—that an action to quiet title will not lie in favor of the owner of an equitable interest as against the holder of the legal title;[4] also that such an action cannot be maintained where it appears that the legal title is in the defendant, though the plaintiff may be entitled to a conveyance from

[1] San Francisco *vs.* Itsell, 133 U. S. 65; Giles *vs.* Little, 134 U. S. 646; California *vs.* Holladay, 159 U. S. 415.

[2] O'Neil *vs.* Vermont, 144 U. S., pp. 336 and 368; Beatty *vs.* Benton, 135 U. S. 244; Eustes *vs.* Bolles, 150 U. S. 366.

[3] De Saussure *vs.* Gaillard, 127 U. S. 234.

[4] Von Drachenfels *vs.* Doolittle, 77 Cal. 295; Fredriker *vs.* East Riverside I. Dist., 10 Cal. 38; Frost *vs.* Spitle, 121 U. S. 552.

the defendant of the legal title because of some trust or trust relation affecting that title or the holder thereof.[1]

THE AVERMENTS OF THE COMPLAINT ARE TO BE TAKEN MOST STRONGLY AGAINST THE PLAINTIFF IN ERROR.

For the purposes of this motion, as for all other purposes, the plaintiff's complaint is to be interpreted in such manner as will be most favorable to the defendant. The presumption is that the pleader has stated his case as favorably for his side of the controversy as the facts will justify; and hence the rule adopted by the Courts is, that a pleading is to be construed most strongly against the pleader and that AMBIGUITIES AND INCONSISTENCIES APPEARING ON THE FACE OF THE PLEADING ARE TO BE RESOLVED AGAINST HIM.[2] Especially does this rule apply where the plaintiff stands on the sufficiency of his pleading, as against a demurrer pointing out its insufficiency.[3]

If, therefore, there are allegations of fact contained in this complaint—as there certainly are—which sufficiently show title in Maria Baker individually under the City Deed to the property which that deed conveyed, and if that property be considered to be the subject of this action, then those allegations must be accepted as conclusive upon the plaintiff notwithstanding that there may be elsewhere in the pleading inconsistent averments of conclusions of law or even of matters of fact touching the same property or the supposed rights of John H. Baker and of his personal representative concerning the same.

That whatever averments are inconsistent with the allegations referred to are mere conclusions of law is apparent. The allegation that Maria Baker applied for and obtained her City Deed "in her official capacity as the administratrix of the estate of John H. Baker, deceased and for the use, benefit and behoof of said estate and not in her individual capacity nor for her own private uses or purposes is of that nature. Indeed, it is mere deduction and argument." This and the other conclusions of law thrown into the complaint, do not, of course, control or affect the specific statement of facts contained therein; on the contrary the latter must and do rule the pleading.[4] The averments of mere matters of law will be treated as if they were not made; because, so far as they are correct, they are useless, and when erroneous, they are worse than useless.[5]

As to all these matters, however, this Court has no jurisdiction to review the decision of the State Court thereon. But it will apply the rule above cited while considering whether a federal question was raised and presented to the State Court by the Complaint, and whether in passing upon the demurrer to the complaint the State Court actually decided a federal question, or whether the decis-

[1] Nidever *vs.* Ayers, 83 Cal. 39; Harrigan *vs.* Mowry, 84 Cal. 456; Shanahan *vs.* Crampton, 92 Cal. 99.
[2] Rogers *vs.* Shannon, 52 Cal. 107; U. S. *vs.* Linn, 1 How. 104.
[3] Glide *vs.* Dwyer, 83 Cal. 477.
[4] Ragsdale *vs.* Mitchell, 97 Ind. 459.
[5] Ohm *vs.* San Francisco, 92 Cal. 449.

ion of such a question was necessary to the judgment rendered by that Court on the demurrer. The FACTS alleged touching Maria Baker's application for and receipt of a deed from the City will be considered to have been taken as true by the State Court and to have been the basis of its decision and to have furnished a sufficient ground therefor.

For the reasons aforesaid, defendant moves that the writ of error herein be dismissed.

Respectfully submitted,

S. W. & E. B. HOLLADAY,

A. N. DROWN,

Counsel for Defendant.

San Francisco, January 18, 1897.

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Brief of Plaintiff in Error on Defendant's Motion to Dismiss for want of Jurisdiction.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1896.

No. 346.

FAIRFAX H. WHEELAN,
ADMINISTRATOR, ETC.
PLAINTIFF IN ERROR,

vs.

JOHN BRICKELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED FEBRUARY.....1897.

(16,039.)

IN THE SUPREME COURT OF THE UNITED STATES.

FAIRFAX H. WHEELAN, Administrator, etc.,
Plaintiff in Error,
vs.
JOHN BRICKELL
Defendant in Error.

No. 346.
October term, 1896.

BRIEF OF PLAINTIFF IN ERROR ON DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION.

The first point counsel for Defendant in Error refer to in their brief is, as to the identity of the land as to which Plaintiff in Error seeks to quiet title.

It is alleged in the Complaint (Record p. 2) that Baker died on the 30th day of March, 1863; that at his death and prior thereto he was the owner and in the possession of certain lands, to be thereafter designated and known as the Golden Gate and Baker Ranches.

That his widow petitioned to be and was appointed administratrix of his estate. (p. 2.)

That while acting as administratrix she petitioned to have said lands (i. e, of her deceased husband) deeded to her under the Act of Congress relating to Outside Lands in the City and County of San Francisco, alleging herself to be the bona-fide possessor thereof (pp. 3 and 4).

It further appears that she attempted to mortgage the lands so belonging to the Estate of Baker, "hereinbefore referred to and hereinafter specifically described, etc.," (p. 5), and which she obtained by petition.

That upon foreclosure of said mortgage said lands were bought by defendant in error, John Brickell; that he has ever since been in possession, etc., "but such possession * * * was and is in subordination to the title of the said John H. Baker, deceased, and in subordination of the rights and duty of the said Maria Baker as such administratrix and otherwise * * * to maintain and protect the possession of all of said lands in and for the benefit of said Estate and the said heirs of said John H. Baker, deceased, etc."

We submit that it sufficiently appears from the Complaint that the lands therein mentioned all refer to the same property and that said property was a portion of the Outside Lands of San Francisco, which were the subject of an Act of Congress passed March 8th, 1866.

As to counsel's contention that no federal question is involved in the controversy, we submit that we have pleaded and claimed a right arising under an Act of Congress, to-wit: a wrongful grant of lands

under the Act of Congress of March 8th, 1866, to the Administratrix of the Baker Estate, in *propria persona* instead of a grant to her as the Administratrix and *ipso facto* the Trustee of said Estate.

It is the claim of this plaintiff that the Estate of Baker was in possession of the premises when the Act of Congress of March 8th, 1866 was passed, and not Maria Baker in her own right; that the granting of the Outside Lands was a trust to be performed in accordance with said Act; and if, as in this case, said trust was imperfectly or wrongfully carried out to the detriment of any *bona fide* possessor, then it is in the province of this Honorable Court to grant a writ to the State Court.

In Counsel's Brief in support of this motion, reference is made to the case of Baker *vs.* Brickell, 87 Cal., p. 302, where this very contention was passed upon, and it was there held that the plaintiff had no title or right under said Act of Congress, and the decision is based upon that ground.

The decision in this case expressly refers to that decision and is based on that ground.

No other contention has ever been made, heretofore, than that the Complaint failed to state sufficient facts, in that it alleged a right to the property in the Estate of Baker, under said Act of Congress, and the decisions here were and are all against that right.

In the argument on the Demurrer at Nisi Prius, the construction to be placed on the Act of Congress of March 8th, 1866, providing for settling the titles of certain Outside Lands in San Francisco, was the only question argued or raised, and judgment passed for the defendant Brickell solely upon the authority of Baker vs. Brickell, *supra.*

That this Court will take jurisdiction of cases arising under such Acts is well established in the cases known as the Arkansas Hot Springs Cases, Rector vs. Gibbons, 111 U. S. 278, pp. 184 and 286.

We submit that it sufficiently appears from the Record here that "there was drawn in question the construction of * * * a statute of the United States, and the decision was against the title, right, privilege or exemption specially set up, etc."

The motion to dismiss is submitted by Plaintiff in Error upon foregoing brief.

Respectfully,

CHAS. N. FOX,
Counsel for Plaintiff in Error.

KING & SHAW, of Counsel.